

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

GARY ALAN HOLLINGSHEAD,	)	
	)	No. CV-10-0319-CI
Plaintiff,	)	
	)	ORDER DENYING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND GRANTING DEFENDANT'S
MICHAEL J. ASTRUE, Commissioner	)	MOTION FOR SUMMARY JUDGMENT
of Social Security,	)	
	)	
Defendant.	)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 12, 15.) Attorney Lora Lee Stover represents Gary A. Hollingshead (Plaintiff); Special Assistant United States Attorney Nancy A. Mishalanie represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 6.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

**JURISDICTION**

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on August 14, 2008. (Tr. 9, 162, 165.) He alleged disability due to frozen shoulder syndrome, diabetes, dizziness, weakness and depression with alleged onset date of November 15, 2002. (Tr. 189, 194.) His claim was denied initially and on reconsideration. Plaintiff requested a hearing before an administrative law judge (ALJ), which was held on November 12, 2009, before ALJ James W. Sherry. (Tr. 31-81.)

1 Plaintiff, who was represented by counsel, and vocational expert  
2 Deborah Lapoint (VE) testified. (*Id.*) The ALJ denied benefits on  
3 January 11, 2010, and the Appeals Council denied review. (Tr. 9-22,  
4 1-5.) The instant matter is before this court pursuant to 42 U.S.C.  
5 § 405(g).

#### 6 STANDARD OF REVIEW

7 It is the role of the trier of fact, not this court, to resolve  
8 conflicts in evidence. *Richardson v. Perales*, 402 U.S. 389, 400  
9 (1971). If evidence supports more than one rational interpretation,  
10 the court may not substitute its judgment for that of the  
11 Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999);  
12 *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984). Nevertheless,  
13 a decision supported by substantial evidence will still be set aside  
14 if the proper legal standards were not applied in weighing the  
15 evidence and making the decision. *Browner v. Secretary of Health*  
16 *and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If there is  
17 substantial evidence to support the administrative findings, or if  
18 there is conflicting evidence that will support a finding of either  
19 disability or non-disability, the finding of the Commissioner is  
20 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
21 1987).

#### 22 SEQUENTIAL EVALUATION PROCESS

23 The Commissioner has established a five-step sequential  
24 evaluation process for determining whether a person is disabled. 20  
25 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.  
26 137, 140-42 (1987). In steps one through four, the burden of proof  
27 rests upon the claimant to establish a prima facie case of  
28

entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971). This burden is met once a claimant establishes that a physical or mental medically determinable impairment prevents him from engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a), 416.920(a). At step five, the burden shifts to the Commissioner to show that (1) the claimant can perform other substantial gainful activity; and (2) a "significant number of jobs exist in the national economy" which claimant can perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

#### STATEMENT OF THE CASE

The facts of the case are set forth in detail in the transcript of proceedings and are briefly summarized here. At the time of the hearing, Plaintiff was almost 49 years old. He was a single parent living with his two young sons. (Tr. 39-40.) He testified he completed 11<sup>th</sup> grade and had a high-school equivalency degree. (Tr. 41.) Plaintiff had a long work history as a sheet-metal worker. (Tr. 201.) He testified he could no longer work due to depression, fatigue, chronic dizziness, pain, and problems caused by his shoulders, diabetes, and problems with his pancreas. (Tr. 50-51.) He stated his right shoulder was worse than the left after treatment. (Tr. 51-52.)

#### ADMINISTRATIVE DECISION

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since the alleged onset date. (Tr. 11.) At step two, the ALJ summarized the medical evidence and found Plaintiff had the severe impairments of "bilateral frozen

1 shoulder/adhesive colitis; status post EUA/MUA<sup>[1]</sup> right shoulder  
2 posterosuperior labral tear (small); diabetes with diabetic  
3 ketoacidosis; pancreatitis; hypertension; hyperlipidemia;  
4 alcoholism; THC abuse; major depressive disorder, recurrent, mild;  
5 and depression." *Id.*) At step three, he found Plaintiff's  
6 impairments, alone and in combination, did not meet or medically  
7 equal one of the listed impairments in 20 C.F.R., Appendix 1,  
8 Subpart P, Regulations No. 4 (Listings). (Tr. 13.) At step four,  
9 he determined Plaintiff had the residual functional capacity (RFC)  
10 to perform light work with the following restrictions:

11 [H]e is capable of occasional lifting up to 20 pounds at  
12 a time; frequently lifting and carrying 10 pounds;  
13 standing, walking and sitting for 6 hours out of an 8 hour  
14 day; occasional pushing/pulling with the right within  
15 lifting restrictions; never climbing ladders, ropes or  
16 scaffolds; frequent climbing of ramps or stairs,  
17 balancing, stooping, crouching, kneeling and crawling and  
18 occasional right reaching and right reaching overhead. He  
19 should avoid concentrated exposure to extreme cold,  
20 irritants such as fumes, odors, dusts, chemicals and  
21 gases, unprotected heights and use of moving machinery.  
22 He is capable of simple and some complex tasks and  
23 carrying out short and simple instructions but has  
24 episodic lapses in attention and concentration.

19 (Tr. 14-15.) The ALJ found Plaintiff's subjective symptom  
20 complaints that were inconsistent with this RFC were not credible.  
21 (Tr. 16-17.) He determined Plaintiff could no longer perform his  
22 past relevant work and proceeded to step five. (Tr. 20.) At step  
23 five, based in part on the RFC and VE testimony, the ALJ found there  
24 were unskilled light jobs in the national economy that Plaintiff  
25 could perform. (Tr. 20.) He concluded Plaintiff was not disabled,

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26  
27 <sup>1</sup> Examination under anesthesia (EUA) and manipulation under  
28 anesthesia (MUA). (Tr. 12.)

1 as defined by the Social Security Act, from November 15, 2002,  
2 through the date of his decision. (Tr. 21.)

### 3 ISSUES

4 The question is whether the ALJ's decision is supported by  
5 substantial evidence and free of legal error. Plaintiff asserts the  
6 ALJ erred when: (1) he assessed his credibility; (2) he rejected  
7 medical provider and consultative examiner opinions in the record;  
8 (3) he assessed his RFC; and (4) he posed an incomplete hypothetical  
9 to the VE. (ECF No. 13 at 7.) Defendant argues the ALJ's decision  
10 is supported by substantial evidence and should be affirmed. (ECF  
11 No. 16.)

### 12 DISCUSSION

#### 13 A. Credibility

14 Plaintiff appears to argue that because his providers do not  
15 report exaggeration of symptoms and there is no affirmative evidence  
16 of malingering, the ALJ should have credited his entire testimony.  
17 (ECF No. 13 at 11-12.) However, that is not the proper legal  
18 standard for rejecting subjective complaints in these proceedings.

19 When the ALJ finds a claimant's symptom allegations are not  
20 credible, if there is no affirmative evidence of malingering, the  
21 ALJ must provide "clear and convincing" reasons for rejecting the  
22 claimant's allegations. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup>  
23 Cir. 1998). If the ALJ's credibility findings are supported by  
24 substantial evidence in the record, "the court may not engage in  
25 second-guessing." *Thomas V Barnhart*, 278 F.3d 947, 959 (9<sup>th</sup> Cir.  
26 2002); *Fair v. Bowen*, 885 F.2d 597, 604 (9<sup>th</sup> Cir. 1999) ("Credibility  
27 determinations are the province of the ALJ."). Once the ALJ has  
28

1 found a claimant's medically determinable impairments could  
2 reasonably be expected to produce alleged symptoms, he must consider  
3 certain factors in determining credibility. Those factors include  
4 reported daily activities inconsistent with alleged complaints;  
5 inconsistencies between allegations and conduct; observations of  
6 physicians and third parties concerning the nature, severity, and  
7 effect of the alleged symptoms; and any unexplained failure to  
8 follow treatment recommendations. *Tommasetti v. Astrue*, 533 F.3d  
9 1035, 1039 (9<sup>th</sup> Cir. 2008); *Lingenfelter v. Astrue*, 504 F.3d 1028,  
10 1040 (9<sup>th</sup> Cir. 2007); *Social Security Ruling (SSR)*<sup>2</sup> 96-7p.

11 Here, there is no affirmative evidence of malingering. The ALJ  
12 properly summarized Plaintiff's written reports and hearing  
13 testimony and gave specific reasons for discounting Plaintiff's  
14 allegations. For example, he referenced Plaintiff's self-reported  
15 daily activities and found they are inconsistent with the degree of  
16 disability claimed. (Tr. 15.) He noted Plaintiff's reported care of  
17 two minor children and upkeep of their home. The ALJ's reasoning is  
18 supported by the record in its entirety, including a 2009 emergency  
19 room report that Plaintiff stated he had "been working all day  
20 moving things from an apartment on the third floor." (Tr. 566.)

21 \_\_\_\_\_  
22 <sup>2</sup> Social Security Rulings are issued to clarify the  
23 Commissioner's regulations and policy. They are not published in  
24 the federal register and do not have the force of law. However,  
25 under the case law, deference is given to the Commissioner's  
26 interpretation of the Regulations. *Ukolov v. Barnhart*, 420 F.3d  
27 1002 n.2 (9<sup>th</sup> Cir. 2005); *Bunnell v. Sullivan*, 947 F.2d 341, 346 n.3  
28 (9<sup>th</sup> Cir. 1991).

1 These "clear and convincing" examples of inconsistencies in  
2 Plaintiff's statements are sufficient to discount allegations of  
3 complete disability. *Lingenfelter*, 504 F.3d at 1040.

4 Consistency with medical records is also an appropriate factor  
5 to consider, as long as it is not the only factor relied upon. *Id.*  
6 Finding Plaintiff's allegations were not supported by medical  
7 evidence, the ALJ cited objective evidence from Plaintiff's  
8 physicians that contradict allegations of disabling symptoms. (Tr.  
9 17.) For example, as found by the ALJ, Plaintiff failed to follow  
10 up on treatment recommendations, was non-compliant in his medication  
11 regime, and showed poor effort in strength testing. (Tr. 17, 443,  
12 512, 734, 758.) He referenced physician reports that Plaintiff's  
13 blood pressure and depression are well-controlled with medication;  
14 clinic notes of Plaintiff's satisfaction with shoulder surgery  
15 results; and evidence of routine and conservative treatment. (Tr.  
16 16, 377-83, 566.) As found by the ALJ, contrary to Plaintiff's  
17 allegations of unrelenting symptoms, Dr. Emery's clinic notes  
18 indicate medication taken as prescribed and abstinence from alcohol  
19 substantially resolved diabetes symptoms, dizziness and depression.  
20 (Tr. 17, 407, 410, 512, 734.) Clinic notes from orthopedic  
21 specialist Eric Bowden, M.D., show Plaintiff reported doing  
22 "wonderfully well," in June 2008, after shoulder manipulation. (Tr.  
23 17, 309, 318.) Dr. Bowden observed Plaintiff's most important  
24 concern was keeping his diabetes under control. Plaintiff's  
25 documented non-compliance with treatment requirements supports an  
26 adverse credibility finding. *Tommasetti*, 533 F.3d at 1039.

27 In addition, the record shows Plaintiff was not entirely candid  
28

1 regarding his reported use of drugs and alcohol, in spite of  
2 repeated warnings of the negative impact alcohol abuse has on his  
3 diabetes, blood pressure, and pancreatitis. (See, e.g., Tr. 403-  
4 404, 501, 550, 715.) This evidence supports an adverse credibility  
5 finding. *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9<sup>th</sup> Cir. 1999); see  
6 *Warre v. Commissioner of Social Sec.*, 439 F.3d 1001, 1005 n.3 (9<sup>th</sup>  
7 Cir. 2006)(where ALJ makes legally sufficient findings, the court  
8 may reference additional support in the record). The ALJ's reasons  
9 for discounting Plaintiff's complaints are legally sufficient and  
10 supported by substantial evidence in the entire record.

11 **B. Residual Functional Capacity/ Hypothetical Question**

12 Plaintiff contends the limitations assessed by the ALJ in his  
13 hypothetical question to the VE and in the final RFC do not include  
14 all limitations supported by the record. He specifically argues the  
15 ALJ did not include all physical limitations assessed by Dr. Emery  
16 and the moderate mental limitation assessed by Dr. Gentile, an error  
17 that rendered VE testimony unsupported by substantial evidence.  
18 (ECF No. 13 at 9-13.)

19 Plaintiff first claims limitations caused by his upper  
20 extremity impairments and diabetes were ignored by the ALJ, who  
21 assessed Plaintiff capable of performing light exertional level work<sup>3</sup>

22 \_\_\_\_\_  
23 <sup>3</sup> "Light work" involves lifting no more than 20 pounds at a  
24 time with frequent lifting or carrying objects weighing up to 10  
25 pounds, and a good deal of walking or standing. Light work may also  
26 involve sitting most of the time, but with "some pushing and pulling  
27 of arm-hand or leg-foot controls, which require greater exertion  
28 than in sedentary work." SSR 83-10. However, relatively few



1 with multiple non-exertional limitations. (*Id.*; Tr. 14-15.)  
2 Plaintiff's argument is not persuasive.

3 The record shows Plaintiff's past work as a sheet metal worker  
4 is classified as medium work (*i.e.*, lifting up to fifty pounds, with  
5 frequent lifting or carrying twenty-five pounds), and Plaintiff  
6 reported lifting and carrying up to 100 pounds, 50 pounds  
7 frequently. (Tr. 75.) Considering Dr. Emery's medical opinions and  
8 objective imaging reports, the ALJ found Plaintiff no longer capable  
9 of medium work. (Tr. 14.) He reasonably limited Plaintiff's light  
10 work capacity by including specific restrictions on lifting and  
11 carrying no more than twenty pounds, and ten pounds frequently. He  
12 limited pushing and pulling to occasionally at ten to twenty pounds  
13 with the right arm. (Tr. 14.) In addition, he restricted Plaintiff  
14 to occasional reaching and right reaching overhead.<sup>4</sup> Plaintiff's  
15 argument that the ALJ ignored limitations caused by his upper  
16 extremities fails.

17 Review of the entire record shows the ALJ included functional  
18 limitations (exertional and non-exertional) supported by the record  
19 and found credible by the ALJ in his hypothetical question to the  
20 VE. The VE's opinion that there is work Plaintiff can perform is  
21 thus supported by substantial evidence. *Bayliss v. Barnhart*, 427  
22 F.3d 1211, 1217 (9<sup>th</sup> Cir. 2005). The ALJ's summary of the medical  
23 evidence includes a discussion of findings and limitations assessed

24 \_\_\_\_\_  
25 unskilled light jobs entail working in a seated position. *Id.*

26 <sup>4</sup> The Commissioner defines "frequently" as one-third to two-  
27 thirds of the time and "occasionally" as very little, up to one-  
28 third of the time. SSR 83-10

1 by treating physicians, Drs. Emery and Bowen. (Tr. 12-13.) The ALJ  
2 noted specific limitations caused by Plaintiff's shoulder surgery  
3 and diabetes, but gave little weight to Dr. Emery's opinion that  
4 Plaintiff's physical impairments "markedly affect his employability  
5 status." (Tr. 19.) He reasoned Dr. Emery relied "heavily" on  
6 Plaintiff's subjective statements, which as discussed above, the ALJ  
7 properly found not entirely credible. (Tr. 16-18.) This is a  
8 specific and legitimate reason to reject a treating physician  
9 opinion. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir.  
10 2001)(medical opinions based on subjective complaints can be  
11 rejected where credibility has been properly discounted). In  
12 addition, the ALJ found Dr. Emery's assessment of marked limitations  
13 was inconsistent with his own treatment notes and other evidence in  
14 the record. (Tr. 19.) This is also a legally sufficient reason to  
15 discount a treating opinion.<sup>5</sup> *Tommasetti v. Astrue*, 533 F.3d 1035,  
16 (9<sup>th</sup> Cir. 2008); *Bayliss v. Barnhart*, 427 F.3 1211, 1216 (9<sup>th</sup> Cir.  
17 2005); *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9<sup>th</sup> Cir. 1996). While  
18 Dr. Emery's treating opinions warrant deference, they are not  
19 controlling in the final RFC determination. SSR 96-5p.

20  
21 <sup>5</sup> Where, as here, the ALJ articulates legally sufficient  
22 reasons for discounting a medical opinion, the inclusion of  
23 impermissible reasons does not necessarily mean the entire  
24 assessment was improper. See *Carmickle v. Astrue*, 533 F.3d 1155,  
25 1162 (9<sup>th</sup> Cir. 2008). The ALJ's speculation regarding Dr. Emery's  
26 desire to assist Plaintiff as a motive for his medical opinions is  
27 inapposite in these proceedings.

1 As noted in the ALJ's summary of the entire medical record,  
2 substantial evidence (including imaging reports and Dr. Emery's own  
3 clinic notes) indicates Plaintiff's condition improved when he  
4 complied with treatment recommendation and his prescribed medication  
5 regime. The court reasonably can infer from these specific findings  
6 that the ALJ's reasoning is supported by substantial evidence.  
7 *Magallanes v. Bowen*, 881 F.2d 747, 755 (9<sup>th</sup> Cir. 1989). The ALJ did  
8 not err in rejecting conclusions regarding Plaintiff's employability  
9 included in Dr. Emery's opinion letter. SSR 96-5p (RFC assessment  
10 is an administrative finding of fact reserved to the Commissioner).

11 Regarding alleged problems with concentration, the ALJ  
12 appropriately limited Plaintiff to simple work, with some complex  
13 tasks. He noted claimant had "episodic lapses in attention and  
14 concentration." (Tr. 15.) This mental functional capacity  
15 contrasts significantly to past work Plaintiff performed as a  
16 supervisor in metal fabrication, which is classified as skilled,  
17 with a Specific Vocational Preparation of over 4 years, up to 10  
18 years. (Tr. 75.) The ALJ's determination that Plaintiff had  
19 adequate concentration to perform simple work with episodic lapses  
20 in concentration is supported by substantial evidence from reviewing  
21 psychologist Mary Gentile, Ph.D., examining psychologists James  
22 Bailey, Ph.D., and Robert Capes, Psy.D., all of whom concluded  
23 Plaintiff was not disabled due to mental impairments. (Tr. 19-20,  
24 350, 342-47, 534-37.)<sup>6</sup>

25  
26 <sup>6</sup> Plaintiff appears to argue the ALJ did not properly consider  
27 the moderate limitation in the ability to maintain attention and  
28 concentration assessed by Dr. Gentile. (Tr. 348.) However, review

1 The final determination regarding Plaintiff's ability to  
2 perform basic work is the sole responsibility of the Commissioner.  
3 20 C.F.R. §§ 404.1527(e), 404.1546, 416.927(e), 416.946; SSR 96-5p.  
4 Although no special significance is to be given to a medical source  
5 opinion, the ALJ reasonably included restrictions consistent with  
6 unrejected medical evidence and Plaintiff's credible testimony. The  
7 hypothetical relied upon by the VE reflects limitations supported by  
8 the record and credible testimony. (Tr. 75-76.) Limitations due to  
9 pain were addressed reasonably by the exertional and non-exertional  
10 restrictions propounded to the VE and included in the ALJ's final  
11 RFC determination. (Tr. 14-15.) Because the hypothetical presented  
12 at step five is a rational interpretation of the entire record and  
13 reflects the final RFC determination, the ALJ did not err in relying  
14 on VE testimony that there were jobs in significant numbers that  
15 Plaintiff could perform. Accordingly,

16 **IT IS ORDERED:**

17 1. Plaintiff's Motion for Summary Judgment (**ECF No. 12**) is  
18 **DENIED.**

19 2. Defendant's Motion for Summary Judgment (**ECF No. 15**) is  
20 **GRANTED.**

21 The District Court Executive is directed to file this Order and  
22 provide a copy to counsel for Plaintiff and Defendant. Judgment

23 \_\_\_\_\_  
24 of the relevant record confirms that Dr. Gentile's summary  
25 conclusions and narrative RFC assessment are consistent with the  
26 ALJ's finding that Plaintiff is cognitively intact and capable of  
27 simple work and some complex tasks with "episodic lapses in  
28 attention and concentration." (Tr. 15, 348, 350.)

1 shall be entered for Defendant, and the file shall be **CLOSED**.

2 DATED April 25, 2012.

3  
4 S/ CYNTHIA IMBROGNO  
5 UNITED STATES MAGISTRATE JUDGE  
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